STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Michigan Court of Appeals
(Judges Mark Boonstra, Joel P. Hoekstra and Henry William Saad)

MICHAEL A. RAY AND JACQUELINE M. RAY, AS CO-CONSERVATORS OF THE ESTATE OF KERSCH RAY,

Plaintiffs,

v

Case No. 12-1337-NI
COA No. 322766
Hon. Carol Kuhnke

ERIC SWAGER,

Defendant.

PLAINTIFFS MICHAEL A. RAY'S AND JACQUELINE M. RAY'S, AS CO-CONSERVATORS OF THE ESTATE OF KERSCH RAY'S BRIEF IN ADVANCE OF ORAL ARGUMENT ON THEIR APPLICATION FOR LEAVE TO APPEAL

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ORDER APPEALED FROM AND RELIEF SOUGHT

On October 15, 2015, the Court of Appeals issued its opinion and order which held that Defendant was entitled to summary judgment regarding Plaintiff's claim of gross negligence. The Court of Appeals thus reversed the July 1, 2014, order of the Washtenaw Circuit Court denying defendant's motion for summary disposition. In reversing, the Court of Appeals held that there were no genuine issues of material fact relating to whether the Defendant, a public school athletics coach, was the proximate cause of Plaintiff's injuries.

Plaintiff now seeks leave to appeal the decision of the Court of Appeals pursuant to MCR 7.302. As Plaintiff's Application for leave to appeal set forth, that review is proper for several reasons identified by MCR 7.302(B). Specifically, pursuant to MCR 7.302(B)(2), this issue in this case is of significant public interest and involves claims levied against a state actor. Under MCR 7.302(B)(3), the issue in this matter is of major significance to the state's jurisprudence. Finally, under MCR 7.302(B)(5), the decision of the Court of Appeals is both clearly erroneous *and* conflicts with both decisions of the Court of Appeals and decisions of this Court.

It appears that this opinion amounts to the first time the Court of Appeals has applied this Court's recent decision in *Beals v State*, 497 Mich 363 (2015). Where the Court of Appeals misapplied that opinion, this Court should grant this Application for Leave to Appeal to ensure that future opinions of the Court of Appeals accurately interpret this Court's binding precedent. This Court has seen firsthand the dangers of allowing misinterpretation of its precedent to go uncorrected. For example, this Court's opinion in *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157; 809 F3d 553 (2011) was necessitated by the Court of Appeals routinely misinterpreting this Court's holding in *Fultz v Union-Commerce Assocs*, 470 Mich 460, 469-470, 683 NW2d 587 (2004). Because of that routine misinterpretation, the rule of law this Court

intended to put into effect in 2004 in *Fultz* did not in actuality take hold until 2011. A similar danger exists here. Should the erroneous decision of the Court of Appeals be allowed to stand in this case, future panels of the Court will likely look to this opinion when determining how the *Beals* opinion is to be interpreted and applied. The result of a misinterpretation of Beals would, of course, be of significant public concern as it would wrongfully deprive injured individuals of a remedy.

Since the filing of Plaintiff's Application for Leave to Appeal, this Court has requested that the parties appear for oral argument on the application. The Court further requested that the parties submit additional briefing "addressing whether a reasonable jury could determine that the defendant's conduct was 'the proximate cause' of plaintiff Kersch Ray's injuries where the defendant's actions placed the plaintiff in the dangerous situation that resulted in the plaintiff's injuries."

QUESTION PRESENTED

I. COULD A REASONABLE JURY COULD DETERMINE THAT THE DEFENDANT'S CONDUCT WAS "THE PROXIMATE CAUSE" OF PLAINTIFF KERSCH RAY'S INJURIES WHERE THE DEFENDANT'S ACTIONS PLACED THE PLAINTIFF IN THE DANGEROUS SITUATION THAT RESULTED IN THE PLAINTIFF'S INJURIES?

TRIAL COURT ANSWERED: YES
COURT OF APPEALS ANSWERED: NO
DEFENDANT-APPELLEE ANSWERED: NO
PLAINTIFF-APPELLANT ANSWERED: YES

PLAINTIFFS' BRIEF PRIOR TO ORAL ARGUMENT REGARDING THEIR APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

This cause of action arises out of the truly tragic events that occurred during the early morning hours of September 2, 2011. That morning, 13-year old Kersch Ray followed the order of his cross-country coach, defendant Eric Swager, to cross a road against a red light. He was then struck by a car. As a result of the accident, Kersch had a portion of his skull removed. He suffered several broken bones and was in a vegetative state for months. He had to learn to speak again and now suffers from dementia. He will require care for the remainder of his life because he did exactly what we ask of children: he followed the instructions of an authority figure.

STATEMENT OF FACTS

Factual Background

On September 2, 2011, Kersch Ray was preparing to start his freshman year at Chelsea High School. That day, the freshman students were scheduled to attend an orientation session at the high school. The Chelsea High School Cross Country team held an early practice that morning that would enable to the freshmen students to practice and then attend their orientation. The practice that morning was scheduled to begin at 5:59 a.m (Deposition of Eric Swager, Attached as Exhibit B, p 149). It was, according to Coach Swager, the first morning practice that had been held during Kersch's involvement with the team. (Exhibit B, p 150)

As one would expect, and as team member Stuart Cook testified, it was "very dark" at that time of day (Deposition of Stuart Cook, Attached as Exhibit J, p 8). Despite that darkness, defendant Swager did not mandate that the team members wear reflective clothing or safety vests or carry flashlights (Exhibit B, pp 113, 186-189; Exhibit J, p 31). The team began the run at the high school. The plan that day (in contrast to the arguments in defendant's brief) was to conduct a warm-up run *as a team*, in which the entire group of roughly 20 runners (and one coach) would run together. Then, after that warm-up was complete, the runners would complete a "hard mile," during which time each student would presumably run to the best of his abilities, without regard to staying together (Exhibit J, pp 10-11).

The accident at issue in this case occurred during the warm-up period of the run (Exhibit B, p 81). The team was running along Freer Road, toward Old US 12, which is a two lane highway with a turn lane (Deposition of Scott Platt, attached as Exhibit D, p 16). When the team reached the intersection with Old US 12, the team came to a stop because it encountered a Do Not Walk signal. One of the team members, Mitchell Henschell, pushed the button at the intersection to

cycle the traffic light (Deposition of Mitchell Henschell, attached as Exhibit F, p 13).[1] Consequently, the traffic light would have changed to a walk sign in just a short period of time. Nonetheless, as Henschell testified, Coach Swager then told the team to run across the road despite the Do Not Walk signal (Exhibit F, p 13).

Just as it has become clear that Coach Swager told the team to cross the street despite Henschell having already pushed the button to cycle the light, it is equally clear that Swager was aware that there was a vehicle driving toward the team on Old US 12 (Exhibit B, p 32). That vehicle was the vehicle that ultimately struck Kersch Ray. Swager testified that he saw the vehicle's headlights and judged that it was far enough away to safely cross the street (Exhibit B, pp 176-177). The team, consistent with his instruction, began to cross. This series of events was not unusual for Coach Swager's team. As Charles Miller testified, the team was accustomed to Swager ordering them to cross the street (Deposition of Charles Miller, attached as Exhibit E, p 18). Bram Parkinson testified that once he heard that it was okay to cross, he ran without looking for traffic (Deposition of Bram Parkinson, Attached as Exhibit H, p 30).

Adam Bowersox, one of the team members, testified that as he got into the street, he could hear Coach Swager yelling to "go faster," which could reflect that the vehicle was approaching faster or was closer than Swager initially believed (Deposition of Adam Bowersox, attached as Exhibit G, p 22-23). Indeed, Plaintiff's accident reconstruction expert, Lt. Timothy Abbo, has stated in his affidavit that one cannot adequately judge the distance and speed of a vehicle when it is dark outside (Abbo Affidavit, attached as Exhibit T). Likewise, Sergeant Kinsey, who was involved in the investigation of the accident, has testified that "I like most officers and most people

[1] The opinion of the Court of Appeals seems to overlook Coach Swager's act of overriding the decision to wait for the light to change and instead implies that every team member decided for himself whether it was safe to cross.

have a problem judging speed at night. I believe, this is not scientific, I'm not an accident investigator, but it's, you know, where the headlights are, how close they are to each other, how close they are to the ground and sometimes speed can be deceiving." (Deposition of Sergeant Kinsey, attached as Exhibit L, p 37.)

The vehicle that was approaching was driven by Scott Platt. As Mr. Platt testified, he was not eating or drinking in the car prior to the accident. He was not listening to the radio. His headlights were on. (Exhibit D, p 9.) He was not on medication and he had not been drinking (Exhibit D, p 12). He was not running late that morning. Instead, he was driving in a responsible manner and was travelling *below* the posted speed limit of 45 miles per hour (Exhibit D, p 14).

When Platt was approximately 10 feet from the intersection, he saw a group of runners in the right corner of his vision. Platt testified that while some of the runners to his right had completely crossed Old US 12, a couple of runners were still in the road. Then, within "milliseconds," he felt an impact on the left side of his car. Platt's vehicle had collided with Kersch, as well as one of his teammates, Adam Junkins (Exhibit D, pp 19-22).

Platt testified that he didn't see Kersch until he actually collided with him (Exhibit D, p 41). When asked whether he knows of anything the driver did wrong, Officer Stitt, who was involved in the investigation, testified "I'm not aware of anything, no." (Deposition of Officer Stitt, attached as Exhibit M, p 31.) Consistent with that opinion, Platt was never charged with any form of wrongdoing in connection with these events. The Washtenaw County Sheriff's Department conducted a full accident reconstruction and determined that Platt did not cause the accident (Attached as Exhibit O). Plaintiff's accident reconstruction expert, Lt. Timothy Abbo, has confirmed that conclusion (See Exhibit T). When asked what his view was of Platt's actions, team member Joseph Vermilye testified "Well, because it was like really dark and none of us had

reflective stuff. And by the time he saw us, he was probably way too close to brake." (Deposition of Joseph Vermilye, attached as Exhibit N, p 26)

While Adam Junkins was fortunately not seriously injured in the accident, Kersch's injuries were catastrophic. His body went over the top of Platt's car and landed on the road. Jason Patrick was riding his motorcycle that morning when he came upon the accident scene. As Mr. Patrick's affidavit states, when he arrived at the scene, he saw a man (Coach Swagger), administering first aid to "a child laying in the road." As a former firefighter who was trained in first aid, Mr. Patrick stopped at the scene. He "observed that the injured child appeared to have two broken legs and a broken arm. He was not conscious, was not breathing, had a thready pulse and was bleeding from both the arm and the nose." (Affidavit of Jason Patrick, attached as Exhibit S.)

Mr. Patrick waited with Coach Swager for emergency responders to arrive. During that wait, Mr. Patrick asked Swager how the accident occurred. Swager told Mr. Patrick that he didn't realize he had a runner lagging behind and that the runner was struck by a car. (Exhibit S.)

Contrary to Coach Swager's statement at the scene, he did not simply have "one runner" behind him. Based on the evidence in this record, we know that when Platt's vehicle entered the intersection, at least five runners had not made it across the road. Platt testified that he saw a group of runners to his right. He stated that while most of those runners had made it across the street, he believed two of the runners to the right were in the road still (Exhibit D, p 32). In addition to those two runners, Kersch and Junkins were in the road and were both struck by Platt's vehicle. Finally, we know that a fifth runner, Ryan Pennington was the last runner in the group and had not yet made it to the road when Kersch was struck (See Chelsea Police Report, attached as Exhibit P).

As is discussed in further detail below, defendant's motion for summary disposition was premised on the argument that there were essentially two groups of runners that day: "his" group

and then a second group composed of Kersch, Junkins and Pennington. Defendant argues that while he did instruct "*his*" group to cross the street, his instruction did not apply to the Kersch/Junkins/Pennington group and would not have been heard by that group.[2] In support of that argument, defendant has presented this Court with an affidavit from Junkins, in which he states that he did not hear Swager's order to cross the street and that he made his own decision to cross.

The Junkins affidavit explicitly contradicts multiple portions of the record. First, on the day of the accident, Junkins told the police officers that he could hear Coach Swager yelling "Let's go! Let's go! Let's go!" as the team crossed Old US 12. Junkins told the police that fact both at the scene (which amounts to an excited utterance and is thus admissible evidence) and in a subsequent interview at the school (See Exhibit P). While Junkins was sent a notice to appear for deposition, he did not attend and thus has not been questioned regarding his contradicting accounts of the accident (See Exhibit Q).

Just as Junkins told the police that he could hear Coach Swager's order, Ryan Pennington likewise told police that he could hear Swager's order. Pennington's statement is significant because he was the farthest runner from Coach Pennington that morning. By his own estimate, Pennington was up to 50 yards behind Kersch and Junkins (See Exhibit P). Pennington was sent notices to appear for two depositions (See Exhibit R). Like Junkins, he did not comply.

As the Court will see when reading defendant's brief (assuming defendant maintains the positions he took in the trial court and the Court of Appeals), defendant describes these events as if Kersch and Junkins were significantly trailing the rest of their team. Not so. Teammate Charles Miller, who was ***not*** one of the so-called "stragglers," estimated that Kersch was as close as 5 or 6 feet to him when the accident occurred. Miller was close enough that he could feel the "whoosh"

[2] Kersch, as one would expect, has no memory of the events due to his traumatic brain injury.

of the air as the car struck Kersch. He said that the accident occurred "directly behind" him. (Exhibit E, pp 16, 21.) Teammate Bowersox, who was also not one of the alleged stragglers, testified that Kersch was 1-2 meters (or 3-6 feet) behind him at the time of the accident (Exhibit H, p 13).

For his part, Coach Swager has admitted that but for his actions, this accident would have never occurred. During his deposition, the following exchange occurred:

> **Q**. Yes sir. So if the car passes -- if you say nobody run, car coming, we're at a red light, whatever you want to say, car passes, accident will never happen?
>
> **A**. If we wait until that car passes –
>
> **Q**. Yeah.
>
> **A**. --that car would never hit us. I would agree with that.
>
> **Q**. Fair enough.
>
> **A**. I mean I agree with that. If he wait – if everyone waits until the car passes, then, no, that car – that car wouldn't have hit us.
>
> **Q**. Okay.
>
> **A**. I would agree with that. [Exhibit B, pp 180- 181.]

Just as Coach Swager has admitted that this accident would have never occurred if he had simply told his team to wait for car to pass, testimony also confirms that Kersch did nothing wrong in the moments preceding the accident. Charles Miller testified as follows:

> **Q.** Okay. And when Kersch crossed the street, you know, following you and the other team members, he was doing exactly what the people in front of him were doing; is that correct? Meaning running across the street?
>
> **A.** Yes.
>
> MR. MILLER: Objection as to form and foundation.
>
> **A.** But, yes.

Q. I'm sorry. I didn't hear your answer.

A. Yes.

Q. Okay. So he wasn't doing anything different than you were doing, per se?

A. Nope. [Exhibit E, pp 36-37.]

Miller specifically testified that he did not blame Kersch for the accident (Exhibit E, p 31). Likewise, teammate Stuart Cook testified as follows:

> **Q.** Okay. Do you know of anything that Kersch -- do you know. You know, I know you could maybe hypothesize or speculate. But as we sit here today, do you know of anything that Kersch did wrong?
>
> **A.** No, I do not. [Exhibit J, p 36.]

Bram Parkinson testified that when Swager told him to run, he ran without looking to see whether any traffic was coming. He confirmed the accuracy of the following statement: "Coach verbally instructed everyone to go, so we went." (Exhibit H, pp 29-31.) That testimony was consistent with team member David Trimas, who testified as follows:

Q. Okay. And he's in charge at that point, I'm assuming?

A. Yes.

Q. Okay. So when Coach says we can go, everyone goes?

A. Yes.

Q. Is that fair?

A. Yes. [Exhibit K, p 32.]

Scott Platt, the driver, also happened to be a coach of youth sports. Platt explained that in a team setting, coaches are in charge (Exhibit D, p 26). According to Platt, members of teams do what their coaches tell them to do (Exhibit D, p 29) Platt opined that if Swager told his team to cross despite the Do No Walk sign (which he admittedly did), that would be an unreasonable

request (Exhibit D, p 28). Similarly, Officer Gilbreath, one of the investigating officers, testified that Coach Swager was the only adult with the team that day and that he was in the position of an authority figure. He further testified that all the available information showed that Swager told the team to cross the street despite the Do Not Walk sign. Officer Gilbreath testified that there is no situation in which it is permissible to cross against a Do Not Walk signal. (Exhibit I, pp 15-18.) As will be discussed below, Plaintiff's expert witness, Corey Andres, has submitted an affidavit in which he confirms the variety of safety errors made my Coach Swager (See Exhibit U).

Finally, it should be noted that the record demonstrates numerous prior instances in which Coach Swager disregarded safety. As Sergeant Kinsey explained, a man contacted Chelsea Police after Kersch's accident to explain that just a couple of days prior, he was surprised by the Chelsea Cross Country Team as they came "out of nowhere" while he was driving down Freer Road (Exhibit L, p 13). In addition, Officer Gilbreath, had two prior encounters with Coach Swager in 2009 or 2010. Both of those instances involved Coach Swager showing questionable decision making ability regarding his team's safety. In one instance, some of Coach Swager's runners could not be found during the course of a "swamp run" that Coach Swager organized. The runners were located just prior to Officer Gilbreath calling in for air support from helicopters. In the second instance, Officer Gilbreath pulled over Coach Swager, who was driving with several of his team members in his pickup truck. The runners were not wearing seatbelts and Swager was instructed to ensure they were properly belted. (Exhibit I, pp 20-21.)

Procedural History

As a result of the serious injuries he incurred in this accident, Kersch initiated this cause of action. The present appeal arises out of the denial of a motion for summary disposition. Defendant

filed his motion for summary disposition on April 10, 2014. Defendant's motion argued that Plaintiff's cause of action must be dismissed because there were no genuine issues of material fact relating to 1.) Whether Coach Swager was grossly negligent and 2.) Whether that gross negligence was the proximate cause of Kersch's injuries.

Plaintiffs filed their response to defendant's motion on May 21, 2014. Plaintiff's response demonstrated that defendant's motion was entirely based on a selective recitation of facts. Essentially, defendant was urging the trial court to view the record in the most favorable to defendant despite the fact that he was a moving party. Defendant was also urging the trial court to resolve a variety of factual disputes in favor of defendant. Like in the present brief, Plaintiff presented thorough citations to the record evidence to demonstrate that the entire team crossed the road because they were ordered to do so by Coach Swager and that the accident would not have happened but for that order. Plaintiffs supported their arguments with legal authority and directed the trial court to *White v Roseville Public Schools and Matthew Komarowski*, unpublished opinion of the Court of Appeals (Docket No. 307719) and *Hurley v L'anse Creuse School District and Joe Politowicz,* unpublished opinion of the Court of Appeals (Docket No 310143) (attached, respectively, as Exhibits V and W).

The trial court held a hearing on the motion for summary disposition, at which the parties largely reiterated the positions from their briefs. During defense counsel's argument, the trial court demonstrated that it was deeply familiar with the record in this case and refuted much of defendant's argument. Consider the following passage:

> I would agree with you wholeheartedly if the coach were back at the school and had sent all of the runners out and -- and told them individually go run five miles and -- and come back here. You can run any path you want. You can -- you can run as a pack or you can run in small groups, or whatever.
>
> But here you have a situation where the entire team is running together and there's at least some evidence that this is the warm-up where they're supposed to

> stay together as a pack and -- and not run to the best of their abilities, but run as a team.
>
> The coach is running with them. The coach makes the determination. Despite the fact that they're all waiting for the light, the coach says, in essence, we're not gonna wait for the light. I've looked and it's clear. Let's run. And -- and you even have other -- other team members saying when the coach tells you to go, you go. [Hearing, p 6.]

The court also noted that the facts were disputed in relation to whether the entire team was together at the time of Coach Swager's command and noted the need to view the evidence in the light most favorable to Plaintiffs (Hearing, pp 6-7).

At the close of the hearing, the Court issued its ruling from the bench. The Court stated:

> this case is extremely fact laden and -- and the defendant's motion is for summary disposition based on governmental immunity, which will require that a jury find that the defendant's actions were the proximate cause of the injury and that the defendant's actions were grossly negligent. And I think that under the -- the facts and circumstances described here, there's no one but a jury that can make that determination. So I'm denying the Motion for Summary Disposition. [Hearing, p 22.]

The Court issued a written order denying the motion on July 1, 2014.

Because the denial of the motion involved a denial of a claim of governmental immunity, Defendant filed an appeal as of right with the Court of Appeals. Defendant's brief to the Court of Appeals echoed the arguments presented below, as did Plaintiff's response. However, while the appeal was pending, this Court issued its opinion in *Beals v State*, 497 Mich 363 (2015). As will be discussed in detail below, the *Beals* opinion addressed the concept of "the" proximate cause in an action against a lifeguard who failed to save the Plaintiff-decedent from drowning. During oral argument, defense counsel informed the panel of the *Beals* opinion and utilized the opinion to argue that the trial court erred regarding its proximate cause conclusion.

Like defense counsel, Plaintiff's counsel was also prepared to discuss whether *Beals* had any impact on the question before the Court. Plaintiff argued that *Beals* was distinguishable from

the present case and, by its own language, was inapplicable. Specifically, Plaintiff directed the Court to footnote 30 in *Beals*, which addressed the concept of affirmative conduct. While the Defendant in *Beals* took no affirmative conduct, Coach Swager did.

On October 15, 2015, the Court of Appeals issued an opinion reversing the denial of summary disposition. The trial court never addressed the subject of gross negligence. Instead, the Court ruled that because no reasonable finder of fact could determine that Defendant was the proximate cause of Plaintiff's injuries, summary disposition was required. The Court relied on *Beals*, as well as several other opinions, in reaching its conclusion.

Plaintiff then filed his application for leave to appeal with this Court. Plaintiff's application argued that the Court of Appeals erred in ruling that no reasonable jury could hold that Coach Swager was the proximate cause of Kersch's injuries. Plaintiff's application also asserted that this Court should revisit its holdings in *Beals* and *Robinson v City of Detroit*, 462 Mich 439, 462 (2000) entirely. Then, on July 29, 2016, this Court issued an order directing the Clerk to schedule oral argument, pursuant to MCR 7.305(H)(1). The Court's order stated that the parties were to file any supplemental briefing within 42 days "addressing whether a reasonable jury could determine that the defendant's conduct was "the proximate cause" of plaintiff Kersch Ray's injuries where the defendant's actions placed the plaintiff in the dangerous situation that resulted in the plaintiff's injuries."

STANDARD OF REVIEW

Defendant argued that summary disposition was proper pursuant to three distinct court rules. First, defendant directed the Court to MCR 2.116(C)(7), which provides that a motion for summary disposition may be raised where a claim is barred because of immunity. To survive a motion brought pursuant to MCR 2.116(C)(7), the plaintiff must allege facts warranting the

application of an exception to governmental immunity. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). "All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party." *Smith*, 223 Mich App at 616. A plaintiff can overcome such a motion by alleging facts that support application of an exception to governmental immunity. *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009).

Defendant also contended that summary disposition was proper under MCR 2.116(C)(8). "A motion under MCR 2.116(C)(8) should be granted if the pleadings fail to state a claim as a matter of law, and no factual development could justify recovery." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 424 (2008). As the Michigan Supreme Court has explained, "[i]n reviewing the outcome of a motion under MCR 2.116(C)(8), we consider the pleadings alone. We accept the factual allegations in the complaint as true and construe them in a light most favorable to the nonmoving party." *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008).

Finally, defendant argued that summary disposition was proper pursuant to MCR 2.116(C)(10). When a motion is brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (emphasis added). Furthermore, all inferences must be drawn in favor of the non-moving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). Only where the Court is satisfied that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law is summary disposition proper. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In the context of MCR 2.116(C)(10), the Michigan Court of Appeals has stated that it "is liberal in finding a genuine issue of material fact," *Benton v Dart Properties, Inc,* 270 Mich App 437; 715 NW2d 335 (2006), and it is well-established that factual determinations are reserved for juries, as opposed to Courts. *Smith v Anonymous Joint Enterprise,* 487 Mich 102, 130; 793 NW2d 593 (2010).

ANALYSIS

I. A reasonable jury could determine that Defendant's conduct was the proximate cause of Kersch Ray's injuries, where Defendant's actions placed Kersch in the dangerous situation that resulted in his injuries.

Pursuant to MCL 691.1407(2)(c), a government employee such as Coach Swager is not subject to tort liability if "The officer's, employee's, member's, or volunteer's conduct does not amount to [1.] gross negligence that is [2.] the proximate cause of the injury or damage." In the present case, the Court of Appeals concluded that it was unnecessary to address the gross negligence portion of that statute because it concluded that reasonable minds could not differ regarding the proximate cause requirement. Likewise, in response to Plaintiff's Application for Leave to Appeal, this Honorable Court has requested that the parties appear for oral argument and file supplemental briefing regarding the specific question of whether "a reasonable jury could determine that the defendant's conduct was 'the proximate cause' of plaintiff Kersch Ray's injuries where the defendant's actions placed the plaintiff in the dangerous situation that resulted in the plaintiff's injuries."

The question on which this Court has directed the parties focus directly implicates this Court's relatively recent opinion in *Beals*. In *Beals*, the Plaintiff-decedent was a 19-year-old autistic individual who lived at a state-owned facility for the disabled. There was a swimming pool at the facility and that pool was supposed to be supervised by a lifeguard. On the day in

question, the lifeguard who was on duty (and who was also a resident of the facility) did not properly take to his post. Instead, during his shift, he was reportedly socializing with others instead of observing the pool. The Plaintiff, through a series of events that are not entirely known, ultimately drowned in the pool.

The *Beals* Plaintiff brought suit and alleged that the lifeguard was grossly negligent in failing to properly monitor the pool during his shift and that his gross negligence was the proximate cause of the Plaintiff's death. This Court disagreed. The Court held that "it is readily apparent that the far more "immediate, efficient, and direct cause" of the deceased's death was that which caused him to remain submerged in the deep end of the pool without resurfacing. That the reason for the deceased's prolonged submersion in the water is unknown does not make that unidentified reason any less the proximate cause of his death." Thus, because the defendant was not the proximate cause of the Plaintiff's death, he was entitled to governmental immunity.

Any discussion of *Beals* that fails to discuss footnotes 30 and 31 in that opinion fails to acknowledge the actual nature of this Court's ruling. Unfortunately, in reversing the denial of summary disposition in the present case, the Court of Appeals did not account for those portions of *Beals*. Those footnotes directly relate to the question that this Court has asked the parties to brief and argue.

In Footnote 31 in *Beals*, Justice Zahra wrote

> Moreover, it is more clear in the instant case that the defendant government employee was not the proximate cause of the relevant death than was the case in *Dean*, as Harman did not take any type of affirmative action to increase the danger posed to Beals as the defendant allegedly did in *Dean* by pushing the fire to the back of the home.

The Court then stated in the text of its opinion that

> Consequently, because no jury could reasonably find that Harman's failure to intervene in Beals's drowning was the proximate cause of his death on the basis of

> the facts presented in this case, the trial court should have granted summary disposition in favor of Harman under MCR 2.116(C)(7), as Harman is entitled to the protections of governmental immunity.

That sentence was immediately followed by Footnote 31, in which Justice Zahra explained that while the Defendant was entitled to governmental immunity, the Court's conclusion was not compelled by the same reasoning as Judge O'Connell in his dissenting opinion in the Court of Appeals. Justice Zahra explained that:

> While we agree with the dissent's conclusion that Harman is protected by governmental immunity, we do not endorse Judge O'Connell's statement that "[a] chain of events . . . cannot logically be the one most direct and immediate cause of a death, and as such cannot be the source of tort liability against a governmental employee." (O'Connell, J., dissenting in part). Because Harman's participation in a chain of events was not the proximate cause of Beals's death in the instant matter, we need not address under what circumstances a chain of events might constitute the proximate cause of an injury or death in a different factual scenario.

Footnotes 30 and 31 from *Beals* demonstrate two crucial points relative to the present case. First, this Court believes that in the context of a "the proximate cause" analysis, there is an important distinction between affirmative conduct and mere inaction. Second, This Court believes that the fact that an injury followed a chain of events does not per se prevent a reasonable jury from concluding that a governmental actor involved in that chain was "the proximate cause" of the eventual injury.

Turning first to the concept of action vs. inaction, the present case is immediately distinct from *Beals*. In *Beals*, the argument was presented through the lens of omission. The Defendant was alleged to have been, through his *failure to intervene*, the proximate cause of a drowning death. In the present case, of course, the evidence shows that Defendant Swager took specific, affirmative action that placed Kersch Ray in a position of extreme danger. Specifically, the testimony cited at length by the Plaintiffs shows that Defendant Swager was aware that a car was approaching his group of runners, was aware that his team of runners was facing a "do not walk"

sign, was aware that one of his runners pressed the button to initiate the changing of the traffic signal and that despite all of that knowledge, *ordered* his team to run across the road before the signal changed. All of those facts must be accepted as true when deciding whether Defendant was entitled to summary disposition.

The facts, as discussed above, immediately remove this case from the scope of *Beals*. Plaintiff is not arguing in this case that Coach Swager's liability arises out of his failure to stop Kersch Ray from running into the road, in the dark, in front of an oncoming car. Instead, his liability arises from him ordering Kersch Ray, a 13 year old student, to put himself in that position. The trial court recognized the importance of that distinction when it denied the motion for summary disposition, one year before the *Beals* opinion had issued. Judge Kuhnke's ruling from the bench observed that her decision would perhaps be different if the team had been out running independently of the coach, choosing their own route and making their own decisions.

Because it cannot be disputed that Coach Swager took affirmative action that placed Kersch Ray in a position of danger, the next question becomes "could a reasonable jury decide that the affirmative action was the most direct, efficient and immediate cause of the accident?" Plaintiff respectfully submits that the answer is an absolute yes. To be clear, in answering that question in the affirmative, Plaintiff *is not* saying that every reasonable jury would have to conclude that Coach Swager was *the* proximate cause. It is for that reason that Plaintiff did not move for summary disposition in this case. The reality of trial is that there is, in most situations, a host of reasonable conclusions that reasonable people could come to, and a difference of opinion on a subject does not compel the conclusion that one opinion is reasonable and the other is not.

As the Court seemingly implied in Footnote 31 in *Beals*, one of the situations in which there are potentially a variety of multiple, reasonable conclusions is where there is a chain of events

that precedes an injury. While perhaps not a subject that is frequently addressed in the context of a gross negligence/*the* proximate cause argument, the combination of multiple causes or tortious acts is thoroughly addressed in negligence jurisprudence.

"In order to prove causation, plaintiff must show both cause in fact and proximate cause. Cause in fact requires plaintiff to show that her injuries would not have occurred but for defendants' negligent conduct." *Zdrojewski v Murphy*, 254 Mich App 50, 63 (2002) (internal citation omitted). Whether a defendant's negligent act was the cause in fact of a plaintiff's injury is generally an issue reserved for a jury. *Genna v Jackson*, 286 Mich App 413, 418; 781 NW2d 124 (2009).

"On the other hand, legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Like with cause in fact, whether proximate causation exists is a factual determination that is generally reserved for a jury. *Dawe v Dr Reuven Bar-Levav & Assocs, PC*, 289 Mich App 380, 393; 808 NW2d 240 (2010).

"In order for negligence to be the proximate cause of an injury, the injury must be the natural and probable consequence of a negligent act or omission, which under the circumstances, an ordinary prudent person ought reasonably to have foreseen might probably occur as a result of his negligent act." *Dawe*, 289 Mich App at 393-394 (internal quotation and citation omitted). "Two causes frequently operate concurrently so that both constitute a direct proximate cause of the resulting harm." *McMillian v Vliet*, 422 Mich 570, 577 (1985). Therefore, a defendant cannot escape liability for its negligent conduct simply because the negligence of others may also have contributed to the injury suffered by a plaintiff. When a number of factors contribute to produce an injury, one actor's negligence will be considered a proximate cause of the harm if it was a

substantial factor in producing the injury." *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401-402 (1997).

Just as the common law recognizes that not every injury is solely produced by the conduct of one actor, and that the existence of causation is a question of fact for a jury, our civil trial system employs rules and procedures to deal with that reality. Pursuant to the terms of MCL 600.2957(1),

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

In reflection of that statutory provision, our Model Civil Jury Instructions place the task of allocating fault squarely in the hands of a jury. Pursuant to M CIV JI 42.01, when relevant, juries are instructed as follows:

> If you find that multiple parties are at fault, then you must allocate the total fault among those parties.
>
> In determining the percentage of fault of each party, you must consider the nature of the conduct of each party and the extent to which each party's conduct caused or contributed to the plaintiff's injury. The total must add up to 100 percent.

Thus, our civil jury system explains to jurors that multiple parties may have engaged in conduct that caused the subject injuries and then asks the jury to determine the percentage of fault of those actors.

As any experienced trial attorney can likely attest to, the manner in which a jury will ultimately apportion fault is no easy thing to predict. Like any question of fact decided during trial, that determination is the ultimate product of listening to testimony, viewing physical evidence, observing the demeanor of witnesses, making credibility determinations, and considering the arguments of the parties. These are not experiences that can be replicated in

motions for summary disposition and in appellate briefs and arguments.

In the present case, Plaintiff of course believes that when this matter goes to trial, the jury will believe that Coach Swager's gross negligence was the one most immediate, direct and efficient cause of Kersch's accident. Plaintiff of course knows that Defendant, in turn, will attempt to persuade the jury that Kersch's injuries were caused by his own comparative negligence or by the conduct of the driver of the vehicle that struck him. Which argument the jury will find to be more persuasive is impossible to predict, but the fact that a jury could reasonably conclude that it was Coach Swager who was most directly to blame is all that Plaintiff needs to show to be entitled to his day at trial.

In arguing that a possible difference of opinion regarding allocation of fault does not necessitate a grant of summary disposition, Plaintiff is simply asking this Court to recognize what the Court of Appeals has previously recognized in similar cases. As Plaintiff argued below, there are two analogous opinions from the Court of Appeals in which a public school student sued a teacher or instructor after alleging that the teacher's conduct was the proximate cause of his injuries. In those two opinions, the defendants each argued (like the Defendant in this case argues) that the student's own conduct was a more direct cause of the claimed injury. In each instance, the Court of Appeals held that it was for the jury, not the Court, to decide which cause was a more efficient, immediate or direct cause.

In *White v Roseville Public Schools and Matthew Komarowski*, unpublished opinion of the Court of Appeals (Docket No. 307719) (attached as Exhibit V), the Plaintiff was injured when he used a table saw that was not equipped by a safety guard. The evidence demonstrated that the defendant teacher had previously demonstrated how to use the saw to his students, including Plaintiff. During those demonstrations, the Defendant did not use the saw's guard but allegedly

instructed his students to *not* emulate his technique (in contrast to Coach Swager, who instructed his students to replicate his unsafe conduct). When the Plaintiff attempted the same conduct, he cut three of his fingers.

In *White*, the defendant argued that because the plaintiff was injured by his own negligence while using a table saw, he could not show that the defendant was the proximate cause. Much like the defendant in the present case, the defendant in *White* took the position that "negligent supervision can never be the proximate cause of an injury, because the act that allegedly could have been prevented with proper supervision will always be more immediate, efficient, and direct than the negligent supervision." When addressing the argument that the student in *White* was the proximate cause of his own injuries, the Court of Appeals stated:

> The evidence in this case, however, was not limited to negligent supervision. The evidence showed that defendant not only failed to adequately monitor those in his charge, he modeled the hazardous activity that led to plaintiff's injury, and assisted or supervised plaintiff as he copied the hazardous behavior on other occasions. Although defendant contends that the proximate cause was plaintiff's decision to use the saw to perform a dangerous rip cut without the blade guard down, defendant admittedly had demonstrated that same procedure to plaintiff. The fact that the injury occurred while plaintiff was attempting to copy defendant's method supports plaintiff's contention that defendant's conduct was the proximate cause of the injury, and there were no other more direct causes. We believe that where defendant had demonstrated hazardous use of the table saw, failed to take measures to limit unsupervised use of the saw, and plaintiff was injured while attempting to copy defendant's methods, a reasonable jury could determine that defendant's conduct was the proximate cause of plaintiff's injury. Thus, the trial court properly denied summary disposition on the issue of proximate cause.

Just like the defendant in *White* could be considered the proximate cause where he demonstrated the very conduct that caused his student to be injured, so to could Swager be considered the proximate cause where he demonstrated the conduct that caused Kersch's injury. In *White*, there was evidence that the teacher that demonstrated the unsafe conduct specifically told the plaintiff not to emulate his behavior. In contrast, there is no dispute that Swager ordered his team to follow

his dangerous lead.

Like in *White*, the Court of Appeals in *Hurley* also demonstrated that a student is not per se the proximate cause of his own injuries when those injuries result from following a teacher's instructions. The Court in *Hurley* upheld the denial of Summary Disposition to a gym teacher who ordered one of his students to perform sit-ups following return from a prior knee injury, causing injury. The defendant argued that even if he instructed the plaintiff to perform the situps that caused his injury, the student ultimately made the decision to partake in that conduct. The Court of Appeals held that defendant's argument was not a sufficient basis for granting summary disposition because "there was evidence from which the jury could conclude that Politowicz's decision to compel Hurley to perform situps played a far more significant role than Hurley's decision to not more vigorously resist. Therefore, there was a question of fact on the issue of causation."

White and *Hurley* both reflect the essence of Footnote 31 from *Beals*: there are instances where a chain of events precedes an injury, and in certain cases, the determination regarding the most direct cause must be left for a jury. In both *White* and *Hurley*, the Court of Appeals did not hold that a jury would be precluded from finding that the plaintiff-students in those cases were the more direct causes of the claimed injuries. Neither is the Plaintiff in this case advocating for a ruling that a jury should be precluded from considering Kersch's own role in the happening of this accident. Rather, Plaintiff is simply asserting that where he, as a child, was ordered to cross the street by his coach, followed that instruction as any child is told to do, and was then struck by a driver who was not found to be negligent in any way, it is for a jury to weigh the evidence and determine where fault lies. That Defendant is employed by the government should not change that simple reality of our jury system.

As Plaintiff's counsel made clear in his Application for Leave to Appeal, Plaintiff views this Court's decision in *Robinson* as being erroneous. However, even when accepting this Court's holding in *Robinson* as being the controlling law of this State, it is evident that the Court of Appeals erred in reversing the denial of summary disposition. *Robinson* certainly did transform the manner in which gross negligence cases against individual governmental actors are litigated. Yet in holding that a Plaintiff was required to show that the gross negligence of a governmental defendant was the one most immediate, direct and efficient cause of his injury, this Court *did not* hold that the potential existence of other *lesser* causes of an injury would result in summary disposition.

The jurisprudence of this state overwhelmingly shows that questions of causation and allocation of fault are questions that are historically reserved for triers of fact. In this specific case, under these particular facts, there is sufficient evidence for a reasonable finder of fact to conclude that Coach Swager was the *most* culpable tortfeasor and that his conduct was the *most* direct cause of the injury. That his conduct may not have been the *only* cause is simply not the controlling question.

In Footnote 31 in *Beals*, Justice Zahra emphasized that this Court was not endorsing Judge O'Connell's views regarding chain of causation cases and emphasized that *Beals* did not present an instance where the Court had to take any position regarding that subject. This case, however, is the instance in which this Court's words or actions will impact future cases with such fact patterns. If this Court were to allow the Court of Appeals decision in this case to remain undisturbed, an impression would certainly be created for the lower courts of this State that where a governmental actor's conduct was one piece of an alleged causal chain, a finder of fact is not permitted to make allocation of fault and causation determinations. Instead of a Plaintiff having to show that a governmental defendant was "the one *most* immediate, efficient and direct cause"

of an injury, a Plaintiff would have to show that a governmental defendant was the "*sole* immediate, efficient and direct cause" of an injury. That is not what *Robinson* nor *Beals* requires.

CONCLUSION AND RELIEF REQUESTED

As the trial court properly concluded, this action is filled with factual disputes that necessitate the consideration of a jury. When viewed in the light most favorable to Plaintiff, and when considering the extensive case law cited by the parties, a reasonable juror could conclude that Swager was grossly negligent on the morning that he ordered his students to disregard the law and that his act of gross negligence was the one most immediate, direct and efficient cause of Kersch Ray's catastrophic injuries. That a reasonable finder of fact could potentially find otherwise is not fatal to Plaintiff's claim, nor is it the standard that applies when deciding upon a motion for summary disposition.

RELIEF REQUESTED

For the reasons set forth above, and in Plaintiff's Application for Leave to Appeal, Plaintiff respectfully requests that this Honorable Court reverse the Court of Appeals and remand this matter to the trial court with instructions for the case to proceed to trial. Alternatively, Plaintiff requests that this Court grant this Application for Leave to Appeal and give full consideration to the arguments presented within that application.

Respectfully submitted,

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